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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, *Collected Legal Essays*, p. 269.

NOTES ON RECENT MISSOURI CASES

CARRIERS—RELATIONSHIP OF PASSENGER AND CARRIER—DEGREES OF CARE. *May v. Chicago, B. & Q. Co., et al.*¹

A consideration of the law concerning the relationship of passenger and carrier seems to lead one into an impasse.

One starts with the premise that is generally acknowledged. The relationship of passenger and carrier is the result of a contract.² However, the cases have gone so far that it would appear to be wise to discard the idea that the relationship is the result of a contract.^{2a}

1. *May v. Chicago, B. & Q. R. Co.* et al. (1920) 284 Mo. 508, 225 S. W. 660.

2. *Schepers v. Union Depot Ry. Co.* (1894) 126 Mo. 665, 29 S. W. 712; *McCarty v. Railroad* (1904) 104 Mo. App. 596, 80 S. W. 7; *Devoy v. St. Louis Transit Co.* (1905) 192 Mo. 197, 91 S. W. 140; *Canaday v. United Railways Co.* (1908) 134 Mo. App. 282, 113 S. W. 88; *Nolan v. Railway Co.* (1913) 250 Mo. 602, 157 S. W. 637; *Banks v. Kansas City Rys. Co.* (1919) 280 Mo. 227, 217 S. W. 488.

2a. See a discriminating note in 5 Col. L. R. 53: "The questions seem to

be one, not of contract, but of duty to the public, and this duty to a member of the public seems to arise from the concurrence of two facts: (1) that the person has the intention of entering into a contract of carriage, and (2) that he has put himself under the care and control of the carrier in a proper manner." See also 5 Col. L. R. 546; 7 Col. L. R. 626; *Dorsey v. A. T. & S. F. Ry. Co.* (1900) 83 Mo. App. 528 (free passenger); *Sherman v. Hannibal & St. Joseph R. R. Co.* (1880) 72 Mo. 62 (boy on freight train with consent of conductor); *Muehlhausen v. R. R.* (1886) 91 Mo. 332

The chief problem arises from a subsidiary proposition. It is generally stated now in Missouri that a carrier owes a passenger "the highest degree of care".³ It seems to make no difference that in other situations the same court will state that there are no *degrees* of care.⁴

If the courts in Missouri would follow the last proposition in the carrier cases the determination of the relationship of passenger and carrier would not be so much of a storm center.

A person suing in tort is always anxious to establish the relationship whenever possible. Then (aside from other pitfalls) he can go to the jury with an instruction that the defendant owed to the plaintiff "the highest degree of care".⁵ It makes no difference to him that the attempt to divide care into degrees is unscientific and confusing. He can dwell at length upon the phrase and he can make the average juror believe that the defendant owes more than a reasonably careful individual would have done under similar circumstances. Departure from the last standard is apt to mean no mental resting place with the average juror this side of insurance.

The result has been that the relationship of passenger and carrier is often pushed to an extreme. "The rights and privileges of a passenger

(free passenger); *Buck v. The People Street Ry. Co.* (1891) 108 Mo. 179, 18 S. W. 1090 (free passenger); compare *Padget v. Moll & Citizen's Ry. Co.* (1900) 159 Mo. 143, 60 S. W. 121 (newsboy jumping on and off a moving street car to sell his newspapers not a passenger); *McNeill v. Durham & C. R. Co.* (1904) 135 N. C. 682, 47 S. E. 765.

See *Lemon v. Chanslor* (1878) 68 Mo. 340, 1. c. 357, 30 Am. Rep. 799. See 8 Law Series, p. 29.

3. *Devoy v. St. Louis Transit Co.* (1905) 192 Mo. 197, 91 S. W. 140. See 36 Harv. L. R. 340: "This duty is often said to be to exercise the highest degree of care. A more accurate statement is that great diligence is necessary to fulfill the standard of ordinary care under the circumstance." *Canaday v. United Railway Co.* (1908) 134 Mo. 282, 114 S. W. 88 ("A high degree of care looking to safe carriage."); *Spencer v. Transit Co.* (1905) 111 Mo. App. 653, 86 S. W. 593; *May v. Railroad Co.* (1920) 225 S. W. 660; *Benjamin v. Railroad* (1912) 245 Mo. 598, 1. c. 614, 151 S. W. 91; *Gros-hong v. Railways* (1909) 142 Mo. App. 718, 121 S. W. 1084 (ordinary care is

below the legal requirement); *Austin v. Railroad Co.* (1910) 149 Mo. App. 397, 130 S. W. 385.

4. *McPheeters v. Railroad Co.* (1869) 45 Mo. 22 (" - - there is no difference between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet." This dictum was approved in *Lemon v. Chanslor* (1878) 68 Mo. 1. c. 358, which nevertheless tacitly approved instructions containing the highest degree of care doctrine). See 7 Law Series p. 5; 18 Law Series p. 48; *Reed v. Western Un. T. Co.* (1896) 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 592, 58 A. S. R. 609; *Midwest Natl. Bank & Trust Co. v. Davis* (1921) 233 S. W. 406, 1. c. 412 (dissenting opinion by Graves, J.: "In Missouri we have consistently ruled that there are no degrees of negligence - -.") See 25 Law Series p. 56.

5. Imagine the influence of this phrase on the jurors when a following sentence informs them that the passenger is only required to exercise ordinary care. See *Nolan v. Railroad* (1913) 250 Mo. 602, 1. c. 610, 157 S. W. 637.

come into existence the instant a person offers himself for transportation, or comes upon the premises of the carrier and pays or tenders the toll allowed by law for the service demanded, with the intention of embarking at the first reasonable opportunity.⁶ And the duty which the carrier owes to the passenger lasts, as a rule, not only until the place of debarkation is reached and the passenger alights from the vehicle of transportation, but until he, with due promptness and diligence, leaves the premises of the carrier maintained for the accommodation and convenience of passengers entering and leaving the place of getting on and off.” Probably the quotation would be generally accepted as a proper statement of the existing law. Despite this handicap it is believed that the statement can be successfully questioned.

The suggestion is that one is a passenger, at least, as soon as a ticket is purchased provided he has the proper intention. If one has purchased a ticket and thereafter decides to abandon his trip does he cease to be a passenger? If so, may the carrier claim damages for his failure to perform his contract? Or may the individual obtain a refund of the entire amount paid?

To change the situation somewhat, if one with a ticket (obtained while he has the proper intention) change his plan and leave the station does he cease to be a passenger? If such conduct breaches the contract, what is the situation if the same individual again changes his plan and rushes back to the station just in time to take the train he originally intended to use? Does he become a passenger? If so, when and how?

Assuming there is no regulation to the contrary, when does one become a passenger who comes upon a station platform with the intention of taking the next train and paying cash fare upon the train? If the answer be as soon as he enters the station platform, could the carrier sue for a breach if he left before arrival of the train in due course?

If one with a ticket or mileage book enters a station with the intention of taking passage in the ordinary way thereby becomes a passenger what is his status if by a sudden impulse he gets in between the tender and baggage car and is thus carried.⁸ If such conduct breaches the contract, is another contract made if the conductor accepts his ticket and gives him consent to ride in his chosen place?

The difficult cases are relatively few and are apt to be fantastic.⁹

6. When did the relationship of passenger and carrier first arise under the facts disclosed in *Lindsay v. St. Louis & H. Ry. Co.* (1915) 178 S. W. 276.

7. 54 Central Law Journal 86. See also 4 Virginia L. R. 143.

8. See *Illinois C. R. R. v. O'Keefe* (1898) 168 Ill. 155, 48 N. E. 294. Com-

pare *Missouri etc. Ry. v. Williams* (1897) 40 S. W. 350, s. c. (1897) 91 Tex. 255, 42 S. W. 855; *Martin v. Southern Ry.* (1897) 51 S. C. 150, 28 S. E. 303; 19 Harv. L. R. 259.

9. What is the status of one who has travelled part of his journey and is waiting at a street intersection with a transfer

Yet the result seems to be that *in theory* the status of passenger and carrier does not exist until the one in charge of the conveyance has accepted the person desiring to be carried for transportation in that particular conveyance.¹⁰ If this is true, it would seem to follow that the relationship ends when the passenger is discharged from the conveyance.¹¹ Certain discriminations must be made concerning the method of carriage, as railroad, street car, steamboat, etc.¹²

coupon to take another street car? See *Spencer v. Transit Co.* (1905) 111 Mo. App. 653, 86 S. W. 593.

10. Lamm, J., in *Devoy v. St. Louis Transit Co.* (1905) 192 Mo. 197 l. c. 210, 91 S. W. 140, apparently expresses the same idea: "But the law is not so narrow as to conceive of, nor the eyes of the law so dim as to see, the relation of carrier and passenger only when a person is actually on board the car. To the contrary, the law deems that relation to exist when one may be, and treats one as a passenger who is, properly on the steps leaving the car or properly on the steps entering a car as a passenger." *Schaefer v. St. Louis L. & Suburban Ry. Co.* (1894) 128 Mo. 64, 30 S. W. 231 (attempting to board train before it stopped.) Compare *Murphy v. St. Louis etc. Ry. Co.* (1891) 43 Mo. App. 342 (boarding moving train at invitation of conductor); *Lindsay v. St. Louis & H. Ry. Co.* (1915) 178 S. W. 276 (whether the woman had been accepted is a difficult point; but it seems that the carrier owed her a duty regardless of the fact of acceptance); *Palfrey v. United Railways* (1911) 162 Mo. App. 470, 142 S. W. 773; *Illinois Cent. Ry. Co. v. Cotter* (1907) 103 S. W. (Ky.) 279 (boarding a moving train after purchasing ticket at station with intention of taking the particular train; *Donovan v. Hartford Street Ry. Co.* (1894) 65 Conn. 201 (horse car). See a good article by Joseph H. Beale, Jr., in 19 Harv. L. R. 250. Perhaps it does not go as far as suggested in this note but the author is opposed to the notion that mere entrance upon the premises of the carrier with the intention of being transported makes one a passenger.

Banks v. Kansas City Railways Co.

(1919) 280 Mo. 227, 217 S. W. 488 ("On the other hand, if the person indicates his purpose of taking passage upon a car, by being on a platform of a regular stopping place, or by signaling the operator of a car, and the operator by any act indicates his acceptance of the proposed passenger, the contract of carriage is complete, and the person thereupon becomes a passenger. - - - So, too, a car may stop, and a person may fully intend to board it, yet if he waits until the car starts, and the avenues of entrance closed, before he accepts the invitation of the carrier, he is not a passenger." Are these statements entirely consistent? The result of the opinion is commendable.)

11. See 1 Col. L. R. 129, brief review of case where a woman fell from an unrailed and unlighted platform after getting off a train. The defendant argued that she was no longer a passenger because she had determined to remain at the station until daylight. The court responded: "Assuming, but not deciding, that Mrs. Woods would have had no right to remain in the station in the character of a passenger until daylight, she did have the right to remain there and enjoy all the privileges and protection due to a passenger for a reasonable time, under all the circumstances, after alighting from the car." In other words, justice could be administered even if she were not a passenger.

See 6 Col. L. R. 120; *Austin v. Railroad Co.* (1910) 149 Mo. App. 397, 130 S. W. 385 (The *most* that could be said for the carrier is that the passenger was injured in the act of being discharged. If there was negligence the carrier should answer.)

12. *Scott v. Met. Street Ry. Co.*

Even if this theory found general acceptance with the courts it would by no means follow that one not a passenger (within the theory) is without protection. One in a station or upon a platform with a ticket is entitled to due care. One stepping upon a platform with intention of buying a ticket is also entitled to due care, but it seems erroneous to say that the latter is a passenger. There is no magic in having a ticket.¹³ The responsibility of a carrier to individuals is not bound up with the relationship of passenger and carrier.¹⁴

(1909) 138 Mo. App. 196, 120 S. W. 131 (street car; liability should not have depended upon the status of plaintiff as passenger); *Conway v. Railroad* (1911) 161 Mo. App. 81, 142 S. W. 1101 (street car); *Spencer v. Transit Co.* (1905) 111 Mo. App. 653, 86 S. W. 593 (plaintiff's case should not have depended upon his status as a passenger); *O'Mara v. St. Louis Transit Co.* (1903) 102 Mo. App. 202, 76 S. W. 680 (street car).

13. *Laysen v. Chicago B. & Q. R. Co.* (1909) 138 Mo. App. 34, 119 S. W. 1068; *Boling v. Railroad Co.* (1905) 189 Mo. 219, 88 S. W. 35; *Spencer v. Transit Co.* (1905) 111 Mo. App. 653, 86 S. W. 593 (possession of a transfer ticket considered of no importance); *Cornell v. Railroad* (1910) 143 Mo. App. 598, 128 S. W. 1021 (ticket not a contract.)

14. *Jones v. St. Louis Southwestern Ry. Co.* (1894) 125 Mo. 666, 28 S. W. 883 (pullman porter "was entitled to the rights of a passenger" The court was apparently careful not to say that he was a passenger.) Compare *Mellor v. Mo. Pac. Ry. Co.* (1891) 105 Mo. 455, 16 S. W. 849 ("Defendant's duty to him, so far as concerned safe transportation, was as a passenger, so far as concerned his right to safe transit." Plaintiff was a railway mail clerk.); *Magoffin v. The Mo. Pac. Ry. Co.* (1890) 102 Mo. 540, l. c. 543, 15 S. W. 76 (railway mail clerk); *Whitehead v. Ry. Co.* (1899) 99 Mo. 263, 11 S. W. 750 (boy on freight train with consent of agents. "It owed a duty to him, even on the theory that he was not, in the full sense of the term, a passenger.")

Adams v. Railroad (1910) 149 Mo. App. 278, 130 S. W. 48 (Person unable to buy ticket attempted to enter train with-

out exhibiting ticket); *Padgett v. Moll & Citizens Ry Co.* (1900) 159 Mo. 143, 60 S. W. 121 (one not a passenger entitled to ordinary care); *Schepers v. Union Depot Ry. Co.* (1894) 126 Mo. 665, 29 S. W. 279 (dictum that because one is entitled to become a passenger he does not necessarily occupy that status); *McCarty v. Railroad* (1904) 105 Mo. App. 596, 80 S. W. 7 (one boarding street car in unusual place not a passenger but still entitled to ordinary care.) See *Galloway v. Kansas City Rys. Co.* (1921) 233 S. W. 385.

It is submitted that a proper recognition of this fact would have obviated the apparent difficulty which caused a reversal in *Nolan v. Railway Co.* (1913) 250 Mo. 602, 157 S. W. 637.

"In the absence of such invitation Mathews did not become a passenger, and defendant owed him no other duty than that of using ordinary care to avoid injuring him after it discovered, or should have known, that voluntarily and uninvited, he had placed himself on the car in a position of danger." *Mathews v. Railway Co.* (1911) 156 Mo. App. 715, l. c. 723, 137 S. W. 1003. See *Illinois Cent. R. v. Cotter* (1907) 103 S. W. (Ky.) 279; *Speaks v. Ry. Co. etc.* (1914) 179 Mo. App. 311, 166 S. W. 864.

Norfolk & Western R. R. Co. v. Gallicker (1893) 89 Va. 639 (" . . . entitled to the courtesy and protection due to a passenger from the moment he entered upon the premises of the defendant company." But the opinion is not very clear.)

See 8 Law Series, p. 29; *Garrett v. Transit Co.* (1909) 219 Mo. 65, l. c. 95,

*May v. Chicago B. & Q. R. Co. et al.*¹⁵ is a rare case which well presents the difficulty. The trial court instructed that the defendant company and the defendant conductor owed the plaintiff "the highest degree of care that a very prudent person would exercise under the same or similar circumstances". The Supreme Court of Missouri held the instruction erroneous because the conductor was under a duty to exercise ordinary care only. The decision (though written by a learned judge) has been criticised¹⁶ as the result of dividing negligence and care into degrees. There is a more practical aspect. What chance has a common carrier if a jury is instructed that its agent is only required to exercise the care of a reasonably prudent man but that it must do something more than that? Will the average jury stop short of thinking that the carrier is liable in any event except, perhaps, where the plaintiff negligently contributed to the injury?

Again, it is submitted that if the courts would cease to instruct in degrees of care it would be possible to work out the relationship of passenger and carrier on a proper basis. Meanwhile the decisions over the country are confusing though the Missouri courts in the main have shown a distinctly conservative tendency.¹⁷

K. C. S.

WILLS AND PROBATE LAW—EXECUTION—PUBLICATION—ATTESTING WITNESSES. *Ray v. Walker*.¹ W. N. Keener testified that his father, Elias Keener, expressed a desire to make a will and after further conversation the father told his son to get one Webb to prepare the document. Webb was summoned and he brought one Gore with him. Elias Keener, Webb, and Gore were together in a room. The former expressed his wishes and Webb wrote the will.

Webb testified that after the will had been written it was read to Elias Keener who signed it "in his presence". Then: "Gore and myself signed the will as witnesses in his presence."

Gore testified by deposition. He remembered the occasion in question. Keener gave directions. Webb wrote the will and "... I was present while the will was being written". "The will was read to him" (Keener). By indirection Gore testified that he witnessed the will. This

118 S. W. 68; *State ex rel. United Rys. Co. v. Allen* (1922) 240 S. W. 117.

15. *May v. Chicago B. & Q. R. Co. et al.* (1920) 284 Mo. 508, 225 S. W. 660 (opinion by Goode, J.)

16. 34 Harv. L. R. 789: "In defining the duty of care owed its passengers by carrier, the courts generally have made the fundamental error of confusing the

fixed standard of due care with the every-varying quantum of diligence called for by the changing circumstances of particular situations."

17. The author acknowledges the valuable assistance of John W. Coots, Jr., LL. B. U. of Mo., 1923.

1. (1922) 240 S. W. 187.

much seems to be admitted in the opinion. There seems to be sufficient in Gore's deposition to justify a conclusion that he observed Keener sign his will. But this is denied in the opinion.³

In any event, it does not appear in Gore's deposition that he signed as a witness *in the presence of Keener*. Nothing in the testimony of either Webb or Gore indicates that either of them signed because of any *verbal* request from Keener.

The trial court directed a verdict upholding probate of the will. The Supreme Court of Missouri reversed the judgment and remanded the cause. The questions of testamentary capacity and undue influence received the major consideration. That will receive no attention here. Aside from these features the court apparently ruled:⁴ (1) publication is a necessary step in the formalities necessary to a valid will; and (2) in addition thereto each of the two necessary attesting witnesses must testify that he personally was a witness to every step necessary for a formally valid will; and (3) an intending testator must in some manner *request* the signatures of the attesting witnesses.

The justification for this ruling was the Missouri statute, Cyc., and two Missouri decisions.

The statute is quoted in the opinion. It is as follows:

"Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."⁵

It is submitted that the language of the statute does not justify the holding. If any one will take the statute clause by clause and phrase by phrase, it seems to follow that the requirements were met in the case under review. (This leaves out the question of the number of witnesses required to prove the various steps.)

In other words, the will in question was in writing and it was signed by the testator. The third, fourth, and fifth phrases are alternative provisions and not important here. The will was also attested by two competent witnesses who subscribed their names to the will in the presence of the testator. It seems unjustifiable to rule that this statute requires: (1) publication, (2) a request from the intending testator to the intend-

2. "At the time of the writing and signing of the will, he knew his children, grandchildren, and what property he had. . . . Keener had sufficient mental capacity to furnish any information and transact any ordinary business at the time and before the will was signed. 240 S. W. 1. c. 188-189 (Italics supplied).

3. "He does not testify that Keener signed the will in his presence or acknowledged the signature thereto to be his" - - - 240 S. W. 1. c. 192.

4. On these points Walker, J., dissented but expressed no opinion. Decision is that of division two only.

5. R. S. Mo. 1919, Section 507.

ing witnesses that they subscribe their names and (3) that each of the attesting witnesses must testify to the existence of each thing required.

Nevertheless, despite the seemingly unequivocal language of the statute the writer agrees with Mr. John Chipman Gray that the courts in reality make the law and that the legislature only furnishes a source of law. So, it becomes necessary to examine decisions which have interpreted the Missouri statute and similar statutes.

First, is publication required? By publication is meant the process of making it known that the instrument in the process of execution is a will as distinguished from any other sort of an instrument.⁶ Now, it seems fairly certain that the decisions under the English statute of frauds,⁷ and similar statutes, did not require publication.⁸ The uniform attitude

6. Black's Law Dictionary (2nd Ed.) p. 964; Schouler on Wills (3rd ed.) sec. 326.

It seems that the mere fact that the attesting witnesses "understood" that the paper was a will is not sufficient for publication. *Moodie v. Reid et al.* (1817) 7 Taunt. 355.

Compare *Padgett v. Pence* (1915) 178 S. W. 205; *Withinton et al. v. Withinton et al.* (1842) 7 Mo. 589 ("I am inclined to believe, that the court committed error in refusing to instruct the jury, that the intention of the testator to make a deed, when he signed the said instrument of writing, does not prevent the said instrument from being and operating as a will.") See R. S. Mo. 1919, sec. 521.

See *Vernon v. Vernon* (1905) 69 N. J. E. 759, 61 Atl. 409.

7. 29 Car II, c. 3 (1676). V. "And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenelements devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

R. S. Mo. 1919, section 507 seems to

following the English statute in essential requirements.

Nor is publication required under the later English wills act, which has served as a model to some extent in this country. St. 7 Wm. IV. & 1 Vict. c. 26 (1837) XIII: "And be it further enacted That every will executed in manner hereinbefore required shall be valid without any other publication thereof."

8. Gibbs, C. J. in *Moodie v. Reid et al.* (1817) 7 Taunt. 355 l. c. 361:

"A will, as such, requires no publication; be publication what it may, a will may be good without it." This was a dictum because the will was executed under a power that required publication.

Ross v. Ewer (1744) 3 Atkyns 156 (dictum by Lord Chancellor Hardwicke that publication is necessary.)

Doe v. Burdett (1835) 4 Ad. & El. 1, l. c. 12 (Lord Denman for the court of King's Bench reviewed *Moodie v. Reid*, *supra*, and raised a question as to Gibbs's utterance concerning publication. See also 9 Ad. & El. 936.)

White v. Trustees of the British Museum (1829) 6 Bing 310 (Three witnesses, none of them saw the testator's signature and only one of them knew what the paper was). See *Wright et al. v. Wright* (1831) 7 Bing. 457.

Re Claflin's Will (1902) 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261 (Good opinion reviewing many cases). See *In re Claflin's Will* (1901) 73 Vt. 129, 50 Atl. 815; *Gould v. Theological Seminary* (1901) 189

of courts has been to require no more than is required by the statute which specifies the formalities in the *execution* of a will. The statutes of two states at least have expressly required publication.⁹

Some of the decisions in Missouri on the question of publication cannot be reconciled with decisions generally in England and the United States.

The decision relied upon in the case under review is *Cravens v. Faulconer*.¹⁰ It is not an authority on publication. The court had two definite problems before it and neither concerned the question of publication. The court, in the case being reviewed, quoted some general language¹¹ which is open to an interpretation that publication is necessary. It is only a *dictum*, however. As good a view is that the court in stating that a testator "must do some act declaring it to be his will" only meant that a testator must do something to make it known that the instrument is his in the sense that he had done the thing therein specified. Unfortunately, the term "will" frequently is not used with discrimination. Often when a court states that one must declare an instrument to be his *will* there is no thought that he must declare it to be a will as distinguished from a deed, declaration of trust, power of attorney, or any other legal instrument.¹² So, in *Cravens v. Faulconer* the court says: "... but the acknowledgment by the testator that the name signed to the instrument is his, or that the paper is his will, is sufficient."¹³ (*Italics supplied*).

*Odenwaelder v. Schorr*¹⁴ is apparently in point and states the law thus:

"There must be some declaration by the testator that the paper was his will, and a communication made by him to the witnesses that he desires them to attest it as such. But this need not be verbal. An act or a sign is enough. If the scrivener says this

III. 282, 59 N. E. 536; cases cited in Schouler on Wills (3rd edition) sec. 326, n3.

9. New York and New Jersey. Schouler on Wills (3rd edition) sec. 326. See *Matter of Moore* (1905) 46 Misc. Rep. 537, 95 N. Y. Supp. 61; *Manners v. Manners* (1907) 72 N. J. E. 854, 66 Atl. 583.

10. (1859) 28 Mo. 19.

11. The part quoted is as follows:

"The witnesses must subscribe their names in the presence of the testator in order that they may not impose a different will on him, but it is not necessary that they shall attest the very act and *factum* of signing by the testator. Though he must do some act declaring it to be

his will, no particular form of words is required; and it is uniformly held that it is not necessary that the testator shall actually sign his name to the will in the presence of the attesting witnesses; but the acknowledgment by the testator that the name signed to the instrument is his, or that the paper is his will, is sufficient." 28 Mo. 1. c. 21.

12. See cases cited note 8 *supra*.

13. It is worthy of notice that the court took occasion to say that the Missouri statute was based upon the English statute of frauds. See to some effect *Odenwaelder v. Schorr* (1880) 8 Mo. App. 458, 1. c. 464.

14. (1880) 8 Mo. App. 458.

to the witnesses in the presence of the testator, it will do. The witnesses must know that it is the will of the testator, and witness it at his request. *Mundy v. Mundy*, 15 N. J. Eq. 290; *Cravens v. Faulconer*, 28 Mo. 21."

The Supreme Court of Vermont¹⁵ pointed out the weakness of this Missouri decision:

"In support of this construction of the statute, *Mundy v. Mundy*, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be 'declared to be' the last will and testament of the testator; so no authority for the holding."

*Schierbaum v. Schemme*¹⁶ is not decisive. It does not hold that publication is necessary. The testator and the two witnesses sat at the same table. The will was entirely read to testator and then was read again until testator interrupted, saying: "Stop, that will do, that is right." Surely, under these facts, all will agree with the court that "... when he said that it was right it was equivalent to a formal proclamation that it was his will . . ." Again, one may ask whether the word "will" is meant to designate a particular sort of instrument or whether it means only that a thing has been done.

In *Beyer v. Hermann*¹⁷ the jury asked the circuit judge whether it was necessary "to have the will read to witnesses before attesting same". The answer was in the negative, the appellate court adding "... it is unusual and altogether unnecessary that attesting witnesses to a will should know the contents of the will".

*Ortt v. Leonhardt*¹⁸ is clear cut. The testatrix refused to tell the attesting witnesses the nature of the instrument she requested them to sign. Nevertheless one of them saw the word "will" in the attestation clause and both of them were cognizant of the nature of the document from the circumstances. The holding was that this was sufficient to fulfill the requirements of the statute. Goode, J., in a separate opinion, with his usual discernment, pointed out that "most" states did not require publication but his opinion was that previous Missouri opinions had required publication.

Goode, J., referred to *Cravens v. Faulconer* and *Odenwalder v. Schorr*, *supra*. He also cited *Grimm v. Titman* and *Walton v. Kendrick*.

In *Grimm v. Titman*¹⁹ there seems to have been a sufficient publication. The witnesses were not *expressly* told that the document was a will

15. *In re Claflins Will* (1902) 75 Vt. S. W. 159 seems to contain a dictum at 19, 52 Atl. 1053, 58 L. R. A. 261. most.

16. (1900) 157 Mo. 1, 57 S. W. 526, 17. (1903) 173 Mo. 295, 73 S. W. 164.
80 Am. St. Rep. 604. *Moore et al. v.* 18. (1903) 102 Mo. App. 38, 74 S. W.
McNulty et al. (1901) 164 Mo. 111, 64 423.

19. (1892) 113 Mo. 56, 20 S. W. 664.

but both witnesses were requested to sign a paper in front of them and by reading they became aware that the document was a will. The effect of the opinion is that the above was a sufficient publication and that an *express declaration* was not necessary. It is to be noted, however, that the court did not discuss whether any publication of any sort is required by the Missouri statute.

In *Walton v. Kendrick*²⁰ there was an *express* publication of the will before all of the witnesses. So, there was no consideration given to that problem and the case is not an authority as to the necessity of a publication. *Martin v. Bowder*²¹ is more in point but still no definite consideration was given to the question of publication.

*Murphy v. Clancy*²² does not discuss the necessity of publication but contains a remark that if the witnesses hear the instrument read to the testator a formal declaration that the paper is testator's will is unnecessary.

Aside from the fact that the witnesses were summoned for the purpose of attesting a will there was nothing to show any publication in *Thomas et al. v. English et al.*²³ It would seem that if publication is to be required it should come from the testator or from somebody who acts at least with the tacit approval of the testator. The point was not definitely considered.

*Hughes v. Rader*²⁴ is a difficult decision to analyse. The testimony of the two attesting witnesses is set out verbatim and occupies nearly fifty pages. The testatrix did not expressly publish her will but her son summoned the witnesses and they were present while the will was drafted by him. One witness testified that after the will was drafted it was read to the testatrix; the other witness did not remember of such an occurrence. The court held this to be the legal equivalent of publication, quoting from *Schierbaum v. Schemme*, *supra*.

In *Heinbach v. Heinbach*²⁵ there is enough to satisfy any rational requirement of publication. So, the question of the necessity of it was not clearly presented. The court stated: "It is only necessary that the parties *understand* that he intends it to be his will, that he expects the witnesses to sign it as such, and that *he and the witnesses sign it in the presence of each other* under circumstances showing that they all understand the purpose and effect of the instrument." (Italics supplied). The statement

20. (1894)) 122 Mo. 504, 27 S. W. 872.

21. (1900) 158 Mo. 379, 59 S. W. 227.

22. (1914) 177 Mo. App. 429, 163 S. W. 915.

23. (1914) 180 Mo. App. 358, 167 S. W. 1147.

24. (1904) 183 Mo. 630, 82 S. W. 32.

25. (1918) 274 Mo. 301, 202 S. W. 1123; *Carlson v. Lafgran* (1913) 250

Mo. 527, 157 S. W. 555 seems sound in requiring that it be shown that *testator knew* that he was executing a will. Otherwise, there would be no showing of a testamentary intent. That is different from publication.

seems too broad. Surely it cannot be true that the testator must sign in the presence of the witnesses; nor (under the Missouri statute) that the witnesses must sign in the presence of each other. Furthermore, there is a doubt whether there is a publication if the witnesses merely "understand" that the instrument is a will as distinguished from another sort of instrument.²⁶

*Pritchard v. Thomas*²⁷ is clear enough. Testatrix was asked if she wished to make a will and she responded in the affirmative. The will was written in her presence as she dictated. Then it was read over to her and later she signed. During the whole process of writing and reading the witnesses had been present. The scrivener requested the witnesses in the presence and hearing of testatrix to sign the will. They complied. Upon these facts it is easy enough to agree with the court that there was no failure of proof of "a sufficient publication of the will by testatrix". But it was not necessary to decide and there is no ruling that publication is required in Missouri.

In *Lohmann v. Lohmann*²⁸ the testator made a trip for the particular purpose of having a will prepared. The will was written in his presence as he directed and then was read to him. He approved. Two witnesses were secured and the scrivener said to them in the presence and hearing of the testator: "Mr. Lohmann would like for you to witness his will." Then the testator and two witnesses signed. This was held sufficient, Goode, J., stating:

"As regards publication, *allowing for present purposes that our statutes require it*, if the testator, either by words, acts, signs, or conduct, makes clear to the witnesses that he intends the paper signed to be his will, this is a publication." (Italics supplied.)

The important thing to notice is that Goode, J., by the words italicized indicated his belief that a proper interpretation of the Missouri statute would eliminate any question of publication.

*Cone v. Donovan*²⁹ is a case where publication in the true sense was important. In form the paper was a letter and there was nothing in the nature of an attestation clause except the words, "Signed in the presence of" followed by the signatures of two witnesses. These witnesses identified their signatures, and that of the maker of the instrument but their memories were entirely blank concerning the particular instrument. They testified, however, that it had not been disclosed to them that this paper was a will. The court held this to be a fatal defect, saying:

26. See *Moodie v. Reid*, note 6 *supra*.
See, however, *Padgett v. Pence* (1915) 178 S. W. 205.

27. (1917) 192 S. W. 956.

28. (1919) 216 S. W. 518.

29. (1918) 275 Mo. 557, 204 S. W. 1037.

"There can be no valid attestation of a will unless the attesting witnesses know at the time that the instrument is being made and attested as a will."

Three Missouri cases were cited as authority and all of them have already been considered.

It would appear as if the attorneys for the proponent failed to present properly the question of publication. It was a good opportunity to have called attention to the fact that generally the statute of frauds and similar statutes have not been construed to require publication. There is nothing to indicate that this view was presented to the court.

From the foregoing review this much may be summarized. Missouri requires publication despite the fact that such a requirement is nowhere expressly found in the statute, and despite the fact that the contrary is generally held except where there is a different statutory provision. True, no decision which has been found has given the matter the proper attention. It is also true that of those who have considered the matter apparently only one judge (Goode) has referred to the statute and pointed out that the Missouri view is not the orthodox one.

It is believed, however, that in the case under review there was sufficient to satisfy the requirement of publication. The opinion apparently admits as much provided both witnesses had testified to the existence of each essential step.

Therefore it becomes pertinent to inquire whether it is necessary for at least two attesting witnesses to individually testify to the existence of each step in the proper execution of a will.

In 25 Law Series, p. 60, there was a review of a decision of the Missouri Supreme Court which apparently declared that in a will contest all the attesting witnesses should testify or be accounted for.³⁰ The proposition in question here was given incidental attention.

A further consideration leads to the conclusion that the rule in Missouri is not that each of the attesting witnesses, or even that each of the *necessary* attesting witnesses, must testify to existence of all steps in the process of execution.³¹

30. In the review *Heinbach v. Heinbach* (1918) 274 Mo. 301, 202 S. W. 1123 was overlooked. It is contrary to *Rayl v. Golfingulos* (1921) 233 S. W. 1069 and *Bell v. Smith* (1917) 271 Mo. 619, 197 S. W. 128, unless they are to be distinguished on the basis suggested by White, C. "Those cases which indicate that one witness is insufficient are where there is no other testimony and the absent witness accounted for." Then the Commissioner stated that "proof might be made with-

out the presence of either of the subscribing witnesses" - - -. Compare *Berst v. Morom* (1911) 157 Mo. App. 342, 138 S. W. 74.

31. *Heinbach v. Heinbach* (1918) 274 Mo. 301, 202 S. W. 1123 (Two attesting witnesses; only one called; other in court room; judgment probating will affirmed. White, C., stated: - - - "even if they both were present and swore that the will was not properly executed, it still might be proved by other sufficient

Finally, is it necessary to have a request by the testator that the witnesses attest and subscribe the will? It has been pointed out by Williams, J.,³² that the true doctrine is that the Missouri statute does not require any verbal request. "The statute, as above mentioned, merely requires that the subscribing witnesses sign the will 'in the presence of the testator'. Of course, the word 'presence' necessarily includes knowledge of the act and acquiescence thereto upon the part of the testator."

Nevertheless, there are plenty of decisions in Missouri wherein the courts have assumed or held that a request is necessary. But they have not held that an *express* request is necessary. Furthermore, under the guise of an *implied* request they have sanctioned situations where there was nothing more than knowledge and acquiescence on the part of testator.³³

In any event in the case under review there seems to have been a sufficient *implied* request within the meaning of the Missouri decisions. This much is apparently admitted in the opinion except that, apparently, *both* attesting witnesses did not individually testify to facts showing the request, and that, therefore, the evidence to show a request was deficient.

testimony"); *Graham et al. v. O'Fallon* (1834) 3 Mo. 507 ("One of these witnesses will be enough to establish the due execution of the will if he can prove that he saw the other witnesses subscribe it in the testator's presence"); *Mays v. Mays* (1893) 114 Mo. 546, 21 S. W. 921 (Only one attesting witness testified to testamentary capacity. "The law does not place the validity of these important muniments of title at the mercy of those who may be called upon to verify their execution."); *Craig v. Craig* (1900) 156 Mo. 358, 56 S. W. 1097 (One attesting witness gave sufficient testimony; the memory of other witness almost blank as to the presence of testator; probate of will affirmed); *Holmes v. Holloman* (1849) 12 Mo. 354 (Both attesting witness parties to record and refused to testify; will established by other witness); *Lorts v. Walsh* (1903) 175 Mo. 487, 75 S. W. 95 (Four witnesses to will); *Avaro v. Avaro* (1911) 235 Mo. 424, 138 S. W. 500 ("The testimony of one witness to that effect is sufficient to show that the signatures of two witnesses were placed on the will to attest it."); *Harrell v. Harrell* (1920) 284 Mo. 218, 223 S. W. 919 (Strong opinion by Goode, J.); *Southworth v.*

Southworth (1903) 173 Mo. 59, 73 S. W. 129 ("The further fact that two of the three subscribing witnesses to the will, on the trial, refused to testify that he was of sound mind at the time the instrument was executed, was not of itself sufficient to warrant refusal of probate thereof, if his testamentary capacity was satisfactorily shown by the other attesting witness, and evidence *aliunde*"); *Carlson v. Lafgran* (1913) 250 Mo. 527, 157 S. W. 555; *Odenwaelder v. Schorr* (1880) 8 Mo. App. 458 (Compare *Withinton et al. v. Withinton et al.* (1842) 7 Mo. 589).

32. *Bingaman v. Hannah* (1917) 270 Mo. 611, 194 S. W. 276.

33. *Pritchard v. Thomas et al.* (1917) 192 S. W. 956; *Carlson v. Lafgran et al.* (1913) 250 Mo. 527, 157 S. W. 555; *Murphy et al. v. Clancy et al.* (1914) 177 Mo. App. 429, 163 S. W. 915; *Thomas et al. v. English et al.* (1914) 180 Mo. App. 358, 167 S. W. 1147; *Lindsey v. Stephens* (1910) 229 Mo. 600, 129 S. W. 641; *Hughes et al. v. Rader et al.* (1904) 183 Mo. 630; 82 S. W. 32; *Martin v. Bowdern* (1900) 158 Mo. 379, 59 S. W. 227; *Schierbaum et al. v. Schemme et al.* (1900) 157 Mo. 1, 57 S. W. 526.

In conclusion, it would seem that the objection to the proponent's evidence as to formal execution was in the failure of the attesting witnesses to corroborate each other in the essential steps in a proper execution. As already stated, there is no such rule in Missouri and it is not believed that there is any need or desire for such a stringent requirement.³⁴

K. C. S.

CONVEYANCING—DELIVERY OF DEEDS. *Dallas v. McNutt et al.*¹ A woman, who owned certain land, executed a deed of the same to her nephew, the husband joining. In the instrument it was expressly stated that the grantors were to enjoy the property during their lives, and when both were dead, then the deed should be delivered "by whomever shall get hold of same" to the nephew. The husband, some time later, apparently without the consent of his wife gave this deed to the cashier of a bank with instructions to turn it over to the grantee after the death of himself and wife.

It is essential to the transfer of title by deed that the deed be delivered.² Delivery as applied to deeds has a meaning different from the meaning the word has to the ordinary person for the ordinary legal meaning involves the idea of the transfer of the possession of the thing in respect to which the word is used. At one time actual delivery seems to have been essential to pass title to goods and chattels, while land, not being capable of manual delivery, was transferred by a ceremony called livery of seisin,—a sort of symbolical delivery which resulted in the transfer of the possession and of the title if the feoffor had title.³ Written evidence of this ceremony was not necessary but it became customary to make and deliver an instrument called a charter of feoffment,⁴ which had no effect on the title but was merely legal evidence of what had occurred. Many of the conveyances operating under the Statute of Uses did not have to be evidenced by deeds but eventually it came to be the law that title to real estate could be transferred only by the execution and delivery of a deed.⁵ The act or series of acts necessary to execute and deliver the deed had the effect of transferring the title. After the delivery, the deed is merely evidence of the grantee's title. Probably at first an actual manual handing over of the instrument to the grantee, or to some one for him, was required in order to have a valid delivery.⁶ But such a transfer was not effectual to pass title unless the grantor so intended when he made

34. The author acknowledges the valuable assistance of L. E. Atherton, LL. B. U. of Mo., 1922.

1. (1923) 249 S. W. 35.

2. Williston, Sales, 260.

3. Leake, The Law of Real Property, 2 ed., 32.

4. Tiffany, Real Property, 2 ed., 1566.

5. Tiffany, Real Property, 2 ed., 1575.

6. See Tiffany, Real Property, 2 ed., 1737.

the delivery. The intention of the grantor has come more and more to be the controlling element until delivery it seems has come to be purely a matter of intention.⁷ The word delivery, with this meaning is apt to lead to confusion, because so different from the meaning of the term as ordinarily understood. According to many authorities delivery as applied to deeds, means no more than that the grantor intended the instrument to take effect as his deed.⁸ Such intention may be shown by his words, or his acts, or by both his words and his acts. The usual and customary mode of delivering a deed, that is, of manifesting the necessary intention that it take effect, is by the actual handing over of the instrument to the grantee or to some one for him. Consequently, where it appears that the grantee has retained possession of the instrument, this fact strongly indicates that he had no intent that it take effect as his deed. No presumption of delivery arises from the fact the alleged grantor executed the instrument;⁹ for delivery is a distinct and separate formality. Hence, strong evidence of the grantor's intent that the instrument take effect as his deed, should be required in all cases where he has never parted with control of the instrument. But such evidence may be found in some cases. So, there are authorities to the effect that a deed may be delivered though the grantor never parts with control of the instrument.¹⁰ A number of such cases are in the reports¹¹ in Missouri. If this is true, then in cases where there was no delivery in escrow, *dicta* like the following (taken from the decision under review) are apt to mislead:¹²

"Delivery connotes that the grantor not only parts with all dominion and control¹³ over the instrument, but that he does so with the intention that it take effect and pass title as a present transfer."

Probably the ancestry of statements resembling this is quite ancient and it may at one time have been a fairly accurate statement of the law even when there was no delivery in escrow. Now such statements are

7. Devlin, Deeds, 3 ed., 261; Tiffany, Real Property, 2 ed., 1738; 18 C. J. 201. Properly speaking the transfer of the instrument to a third party is evidence bearing on the grantor's intent. It is by no means conclusive evidence. It is important evidence because this is the customary manner in which the delivery is made.

8. See collection of cases in Devlin, Deeds, 3 ed., 261, 18 C. J. 201.

9. *Boyd v. Slayback* (1883) 63 Cal. 493.

10. See many cases cited in 18 C. J. 201.

11. *Burke v. Adams* (1883) 80 Mo. 504; *Burkey v. Burkey* (1915) 175 S. W. 623; *Chambers v. Chambers* (1910) 227 Mo. 262, 284, 127 S. W. 86; *Crowder v. Searcy* (1890) 103 Mo. 97, 117, 15 S. W. 346.

12. *Dallas v. McNutt* (Mo. Sup.) 249 S. W. 35.

13. "The rule requiring the grantor to part with all dominion and control over the deed is not to be construed as demanding that he must put it beyond his physical power to procure its possession." Devlin, Deeds, 3 ed., 261, citing *Sneathen v. Sneathen* (1891) 104 Mo. 201.

probably repeated over and over because (since delivery of deeds is merely evidenced by manual transfer, and handing over seems to conform to the ordinary legal meaning of the word deliver) the statement at first reading sounds good and seems sound. *Prima facie* it seems to be a yard stick or rule of thumb. The first part of the statement is not accurate if the cases cited in note ten are the law for it is not necessary that the grantor part with all control over the instrument. The second part of the statement is just as doubtful as the first. Suppose the grantor executes a deed of land to his son, and then hands it to a third person with directions to give it to the son after the grantor's death? There is a good delivery so far as the grantor is concerned even though the son does not learn of it until after his father's death.¹⁴ The grantor cannot recall the deed. He is said to have placed it beyond his dominion and control, and the first part of the *dicta* above would be accurate if used in connection with such a state of facts. But does the son get title at once? Does the grantor intend "that it take effect and pass title as a present transfer"? It is submitted this is at least an unsettled question in Missouri.¹⁵ Suppose that A, pursuant to a contract with B, executes a deed to B and delivers it to a third party with directions to deliver it to B on payment of the agreed price within a fixed time? Is there a present transfer to B. It is submitted that B gets no present title though according to the weight of authority he does have the power to get title by performing the condition.¹⁶

The decision in the principal case seems sound for there is little or

The suggestion has been made that all that is meant by parting with all dominion over the instrument is that the grantor part with all control over its effective legal operation—in other words, that the deed has taken effect and cannot be revoked by him. This is in effect merely saying that "part with all dominion and control over the instrument" does not mean what it seems to mean but means something totally different. Thus the rule of law is changed but courts pretend it is not changed.

14. Devlin, *Deeds*, 3 ed., 275c; *Meredith v. Meredith* (1921) 287 Mo. 250, 229 S. W. 179; *White v. Pollock* (1893) 117 Mo. 467, 22 S. W. 1077; *Crowder v. Searcy* (1890) 103 Mo. 97, 15 S. W. 346.

15. A good discussion is found in Tiffany, *Real Property*, 2 ed., 1783-1788. A common theory is that the title remains in the grantor and passes to the grantee only on the second delivery after the

grantor's death or, what is more logical, as soon as the death occurs regardless as to whether the escrow holder makes delivery or not. In order to defeat heirs, devises and certain grantees of the grantor, it is said there is a relation back to the original delivery by the grantor to the escrow holder. It is sometimes said in the second place that title passes to the grantee on the delivery to the escrow holder. It has even been said the title is in suspense, whatever that may mean. Space will not permit a discussion of the merits of these various views. But the question is not free from difficulty and seems not to have been settled in Missouri. Unless the second of the above theories is adopted the statement in question is not accurate.

16. In some jurisdictions there cannot be an irrevocable delivery to a third person on a condition to be performed by the grantee, unless pursuant to a contract

no evidence that the grantor intended the deed to take effect during her life time, and while her husband did make what would probably have been a good delivery in escrow, had he been the grantor, there was no evidence that he was acting as agent for his wife.

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which is specifically enforceable. For a discussion of the matter see article entitled, "Is a Contract Necessary to Create an Effective Escrow," in 16 Mich. L. Rev. 569.